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IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR APPROVAL OF SCHOOLS AND GOVERNMENT RENEWABLE PROGRAM AND FOR APPROVAL OF ITS RENEWABLE ENERGY STANDARD AND TARIFF IMPLEMENTATION PLAN FOR 2011.

DOCKET NO. E-01345A-10-0166
DOCKET NO. E-01345A-10-0262

STAFF COMMENTS

The Utilities Division Staff ("Staff") of the Arizona Corporation Commission ("Commission") hereby provides certain limited comments in response to the comments filed by Arizona Public Service Company ("APS") on January 13, 2011. Staff is providing these comments in an effort to be helpful to the Commission in its consideration of this matter.

I. BRIEF SUMMARY OF STAFF'S RECOMMENDATIONS.

Staff anticipates presenting one witness at the January 24, 2011 hearing: Ray Williamson, the author of the Staff Report that was filed in this matter on November 10, 2010. Mr. Williamson will be available to respond to questions about the Staff Report, if necessary.

Staff recommends that the Commission refrain from amending Decision No. 72022. As a practical matter, APS will file its next Renewable Energy Standard Tariff ("REST") implementation plan on July 1, 2011, scarcely more than five months from now. Staff believes that the issues to be considered at the January 24, 2011 hearing will recur in APS' July implementation plan and may be considered therein. In light of resource constraints, Staff's preference is to address these issues in that proceeding, *i.e.,* in the normal course of business.

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II. THE COMMISSION'S AUTHORITY UNDER A.R.S. § 40-252.

Despite the recommendation above, Staff nonetheless recognizes that it is the *Commission's prerogative* to elect how to proceed in these matters. And it is on this point that Staff significantly disagrees with the comments filed by APS. Specifically, APS contends that the Commission lacks the authority to proceed with the hearing in this matter or to amend the decision. Staff disagrees with these assertions.

A. The Plain Language Of A.R.S. § 40-252 Is At Odds With APS' Arguments.

APS' argument is completely inconsistent with the language of A.R.S. § 40-252, which states that

> [t]he Commission may *at any time,* upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, *rescind, alter or amend any order or decision* made by it.

(Emphasis added). APS asserts that the Commission may reopen an order only upon a showing of "changed circumstances" or "new circumstances," however, these alleged requirements are completely absent from the language of the statute. A plain reading of A.R.S. § 40-252 does not support APS' claim.

B. The Commission Has Broad Discretion To Reopen Its Decisions And To Amend Them Pursuant To A.R.S. § 40-252.

To support its argument that the Commission's authority in this matter is circumscribed, APS relies on cases that address certificates of convenience and necessity ("CC&Ns").[1] The Company's reliance on these authorities is misplaced: these cases discuss "changed circumstances" because of issues concerning CC&Ns, not because of A.R.S. § 40-252. CC&Ns, which concern a Company's authority to conduct business as a public service corporation, are generally afforded a high degree of protection.

The case to which APS devotes the most attention, *James P. Paul*, illustrates this principle. *Paul* involved a deletion of territory from a water company's existing CC&N. *James P. Paul Water Company v. Ariz. Corp. Comm.*, 137 Ariz. 426, 428-29, 671 P.2d 404, 405-06 (1983). The Court's

[1] A CC&N is a grant of regulatory authority to a company to permit it to operate as a public service corporation in the State of Arizona. *See* A.R.S. § 40-281.

concern for protecting the existing CC&N is demonstrated by its thorough comparison of the standard for granting an initial CC&N with the contrasting standard for deletion.[2] Clearly, the issue in *Paul* was not the parameters of A.R.S. § 40-252, but instead the heightened degree of protection to be accorded an existing CC&N.

The fundamental significance of a CC&N to a utility's ability to begin and continue operations—and the corresponding need for a degree of predictability—was discussed in *Arizona Corp. Comm'n. v. Tucson Ins. and Bonding Agency*:

> The corporation commission ***in issuing a certificate of convenience and necessity performs a judicial function*** and the certificate represents the judgment of the commission ***reached in the same manner as a judgment of a court of record.***
>
> The issuance of the certificate of convenience and necessity . . . was based on a determination by the commission that the public interest would thereby be served. ***Such determination is conclusive and in the absence of an appeal therefrom is res judicata.***
>
> The commission, however, is vested with power to rescind, alter or amend a certificate of convenience and necessity after it has once been granted. The exercise of this power requires showing due cause for such action—an affirmative showing that the public interest would thereby be benefitted.

3 Ariz. App. 458, 462, 415 P.2d 472, 476 (1966) (citations omitted). The court thereby acknowledged that an elevated standard is necessary in order to amend a CC&N, because of the unique status of CC&Ns.

By contrast, ratemaking orders are not subject to res judicata principles. As several cases have noted, the Commission is an administrative body that performs legislative, executive, and judicial functions. *Arizona Corp. Comm'n v. Super. Court of the State of Arizona*, 107 Ariz. 24, 26-27, 480 P.2d 988, 990-91 (1971); *See also, State ex rel. Corbin v. Ariz. Corp. Comm'n*, 174 Ariz. 216, 218, 848 P.2d 301, 303 (App. 1992). Decisions that hinge on prospective policy determinations, especially rate-related decisions, fall within the category of the Commission's legislative function.

> [R]es judicata has little application to regulatory action by an agency in fixing utility rates, ***because ratemaking is a legislative,*** not a judicial function. ***It has been held that every rate order may be superseded by another, not only when conditions change, but also when the administrative understanding of the same conditions changes.***

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[2] *Id.* at 430, 671 P.2d at 408.

Southwestern Bel Tel. Co. v. Ark. Public Svc. Comm'n, 267 Ark. 550, 556, 593 S.W.2d *934,* 445 (Ark. 1980).

In a judicial inquiry, a forum "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Arizona Corp. Comm'n v. Super. Court of the State of Arizona,* 107 Ariz. 24, 26-27, 480 P.2d 988, 990-91 (1971), quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226-27 (1908) (Holmes, J.); "[L]egislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." *Id.* Setting a rate establishes a rule for the future, and is therefore legislative, not judicial. *Id.*

The present matter concerns APS' renewable energy implementation plan, required by the Commission's REST Rules.[3] The costs underlying the various components of the plan comprise APS' 2011 REST implementation plan budget, and the Commission-approved budget is the basis for the Commission's determination of APS' REST rate. Without question, these issues are rate-related, and thereby fall within the Commission's legislative function. Cases related to CC&Ns, which are bound up with quasi-judicial, res judicata principles, do not provide appropriate standards for consideration in the present case.

In summary, the standard that APS advocates is essentially a res judicata standard, which is applicable to judicial decisions. The Commission, however, does not always act in a judicial capacity; especially in the area of rate setting, the Commission acts legislatively. Where the Commission is establishing a prospective order, it is clear that a res judicata standard would conflict with the Commission's ability to provide ongoing regulation:

> An agency must at all times be free to take such steps as may be proper in the circumstances irrespective of its past decisions. Even when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act. So long as the Commission enters sufficient findings to show that its action is not arbitrary and capricious, the Commission can alter its decisions.

Citizens v. Idaho Comm'n, 739 P.2d at 362.

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[3] *See* A.A.C. R14-2-1801 *et seq.* The Maricopa County Superior Court has recently determined that the Commission's REST Rules were enacted by the Commission pursuant to its constitutional, ratemaking authority. *Miller v. Arizona Corp. Comm'n,* Judgment Oct. 6, 2009, CV2008-029293, Super. Court of Maricopa County.

C. The Commission's Authority Under Article XV, Section 3 Of The Arizona Constitution Is Exclusive And Plenary, And Cannot Be Limited By Statute.

Even if APS' arguments regarding the statutory construction of A.R.S. § 40-252 were correct—and they are not—those arguments cannot trump the Commission's constitutional authority under Article XV, Section 3 of the Arizona Constitution. That provision provides that

> *classifications, rates, charges, rules, regulations, orders, and forms* or systems prescribed or made by . . . [the]Corporation Commission *may from time to time be amended or repealed by such Commission.*

(Emphasis added). Apparently, Arizona's constitutional framers had the foresight to recognize that the Commission would need to amend its orders from "time to time" in the exercise of its constitutional authority, and provided specific constitutional language to achieve that result.

Article XV, Section 6 of the Arizona Constitution arguably allows the legislature to enact *procedural* statutes to govern the Commission's hearings, but such procedural regulations cannot interfere with the Commission's exercise of its constitutional authority. In other words, the legislature, by enacting A.R.S. § 40-252, cannot place substantive limits upon the Commission's Section 3 power.

APS cites a variety of cases from other jurisdictions to support its arguments,[4] but; those cases are not applicable to the Commission because of the Commission's unique status under the Arizona Constitution. The Commission's constitutional authority is exclusive and may not be circumscribed by the legislature. Accordingly, cases from other jurisdictions that construe statutes similar to A.R.S. § 40-252 are not applicable because those other jurisdictions do not share Arizona's unique constitutional structure, which creates a Corporation Commission with exclusive and plenary authority.

In summary, Article XV, Section 3 does not require a showing of "changed circumstances," the text of A.R.S. § 40-252 does not require a showing of "changed circumstances," and even if it did, such a requirement would be unconstitutional in light of the Commission's authority under Article XV, Section 3.

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[4] It is also worth noting that cases from other jurisdictions do not appear to be unanimous on this issue. *See, e.g., Duquesne Light Co. v. Pa. Publ. Util. Comm'n,* 107 A.2d 745, 749 (Pa. Super. Ct. 1954); *Citizens Utils. Co. v. Idaho Pub. Utils. Comm'n,* 739 P.2d 360, 362 (1987).

D. APS' Claim That There Are No "changed circumstances" Is Premature.

Before the hearing has even convened, APS appears to argue that the evidence will not support a conclusion that "changed circumstances" exist. Even if "changed circumstances" must be demonstrated before the Commission may amend an order—a point that Staff does not concede—it is premature to conclude that such "changed circumstances" will not be demonstrated at the hearing.

Finally, APS appears to imply that the Commission may not even reopen a case pursuant to A.R.S. § 40-252 without a threshold showing of "changed circumstances." Besides being inconsistent with the language of the statute, APS' position is also at odds with Commission practice. Staff notes that parties - - including APS - - routinely file motions under A.R.S. § 40-252.[5] The standard suggested by APS would appear to preclude the Commission from even considering such motions. Such a practice would make A.R.S. § 40-252 inoperative, and is hardly consistent with the intent of either the statute or of Article XV, Section 3.

III. CONCLUSION.

It is the Commission's prerogative to determine how best to consider these issues—whether now or in APS' upcoming REST plan filing. Although Staff recommends that the Commission address these matters in APS' 2011 upcoming filing, it is important to emphasize the following point: Staff recognizes that the Commission retains the prerogative as to when such issues are addressed. APS' suggested limitations on the Commission's authority are not well-founded.

RESPECTFULLY SUBMITTED this 21st day of January, 2011.

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[5] APS Application for approval of rate adjustment mechanisms, E-01345A-02-0403, June 3, 2002; Trico co-op approval of new distributed generation incentives within its svc territory, E-01461A-10-0335, July 10, 2010; Black Mountain Sewer Corp., Rate Case, SW-02361A-08-0609, December 7, 2007; APS Emergency Interim Rates, E-01345A-06-0009, January 6, 2006; Litchfield Park Svc. Co. Rate App., January 14, 2011; TEP Amend 62103, E-01933A-05-0650, September 12, 2005; Wickenburg Ranch Water LLC, Amend 70741, W-03994A-07-0657, September 25, 2009.

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